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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Note verbale dated 30 September 1993 from the Permanent Representative of Japan to the United Nations addressed to the Secretary-General

The Permanent Representative of Japan to the United Nations presents his compliments to the Secretary-General and has the honour to refer to General Assembly decision 47/414 of 25 November 1992, by which it was decided to include in the provisional agenda of its forty-eighth session the item entitled "Convention on jurisdictional immunities of States and their property" and which appears under agenda item 147.

The Permanent Representative of Japan to the United Nations wishes to inform the Secretary-General that he has attached hereto the comments and observations of the Government of Japan concerning the draft articles on jurisdictional immunities of States and their property (see annex) and would be grateful if the Secretary-General would have them circulated as an official document of the General Assembly under agenda item 147.

ANNEX

Comments and observations of the Government of Japan concerning the draft articles on jurisdictional immunities of States and their property

I. GENERAL COMMENTS

1. The Government of Japan, in observing the recent practices of States on State immunity, realizes that, as commercial activities engaged in by States increase, the number of States adopting the principle of restrictive immunity, which holds that State immunity should not be granted without limitation to such activities, is also increasing. However, even among States which uphold the principle of restrictive immunity, actual practices in respect of State immunity are not uniform, and domestic laws adopting the principle of restrictive immunity vary from one State to another.

In view of the above-mentioned situation, we may say that the formulation of unified rules among States as to the extent to which State immunity should be granted is a task facing us in today's world.

2. The draft articles are composed of both a confirmative section and a creative section; in the former, the position in which a State in principle enjoys immunity from jurisdiction is clearly confirmed and demonstrated, and in the latter, the scope and extent to which jurisdictional immunities of States are restricted have been created and described in concrete terms. These structures reflect, in the light of formulating unified rules on State immunity while avoiding going too deeply into theoretical arguments on general principle, the pragmatic approach of seeking a consensus as far as possible on the nature of the activities for which immunity should not be granted.

The Government of Japan values the draft articles, which were formulated on the basis of the approach mentioned above, as the crystallization of the efforts of the International Law Commission to make the draft articles acceptable to as many States as possible.

3. In the deliberations at the Sixth Committee of the United Nations General Assembly in past years, the view of the majority was that, although there still remain some issues to be examined (such as the criteria for determining commercial activities of States, treatment of State enterprises, and immunity from enforcement jurisdiction), appropriate solutions to such issues should indeed be sought through consideration at the Conference of Plenipotentiaries of States. Therefore, the Government of Japan believes that the draft articles might serve as a useful basis for further consideration at that Conference.

The Government of Japan considers it important, as we continue our consideration of the draft articles, taking into account the comments and observations submitted by each respective Government, that we should, following the example of the International Law Commission, avoid going too deeply into theoretical arguments on the general principle of State immunity, and aim at reaching a practical and appropriate solution which will gain the concurrence of the overwhelming majority of States.

4. Turning to Japan's practices on State immunity, a judgement endorsing the principle of absolute immunity was rendered by the former Supreme Court of Japan in 1928 (ref: ST/LEG/SER.B/20, pp. 338-9), and since then, all judgements concerning cases involving State immunity have basically followed that judgement. On the other hand, some of the treaties to which Japan is a party contain provisions to the effect that jurisdictional immunity of the State party in respect of governmental ships used for commercial services and commercial activities engaged in by governmental organs are, to some extent, restricted.

Based on the anticipation that, in the future, foreign Governments or governmental organs will increasingly emerge as parties to international transactions, and that disputes arising between such Governments or governmental organs and Japanese private enterprises or persons with regard to commercial activities, torts, etc., will increase accordingly, the Government of Japan, taking into account the importance of the draft articles, the positions of other States on these, and the merits to be gained in the medium and long term by following the position on jurisdictional immunities of States taken in the draft articles as a whole, has the intention to participate actively in the process of drafting the Convention in accordance with United Nations General Assembly resolutions from past years related to this subject.

II. SPECIFIC COMMENTS

The following are preliminary comments and observations on points which have been drawn to the attention of the Government of Japan so far; moreover, the Government of Japan reserves the possibility to elaborate further on these or to make additional comments and observations on draft articles in the future.

1. Article 1

It is the understanding of the Government of Japan that, in the event of the application of this Convention, both a defendant State and the State of the forum must be parties to the Convention. The Government of Japan wishes to seek clarification on this point, and if the aforementioned understanding is correct, this article should clearly be drafted to that effect. (For example, the term "State", which is used twice in this article, should be amended to "State party to this Convention".)

2. Article 2, paragraph 1 (b) (iv)

(1) The words "however named" should be inserted in paragraph 1 (b) (iv), so that the words "agencies or instrumentalities" and "other entities" in the following paragraph are meant to include any type of agency or instrumentality or entity however named. Therefore, the paragraph should read as follows:

> "(iv) Agencies or instrumentalities of the States and other entities, however named, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;"

(2) It is deemed necessary to make an in-depth examination of the meaning of the words "exercise of the sovereign authority of the State" (for example, whether or not the central bank of a State or agencies connected to its official

development assistance, etc., are to be included in this paragraph). And the wording should be amended, if necessary, so as to make the meaning more explicit.

3. The treatment of armed forces of a State stationed in another State

(1) In case armed forces of a State (hereinafter referred to as "the Sending State") are stationed in another State (hereinafter referred to as "the Sending State") are stationed in another State (hereinafter referred to as "the Host State"), such matters as the status of the armed forces of the Sending State and their privileges and immunities in the Host State are usually stipulated in an International Agreement between both States. Such International Agreements are, in general, concluded on the basis of a delicate balance of interests between their State parties, which reflects the unique bilateral relationship between them. Among matters which might be subject to such International Agreements, the issue of jurisdictional immunity, for example, has various aspects such as the aspect of immunity of members of armed forces, the aspect of their immunity from criminal jurisdiction of the Host State, as well as the aspect of the jurisdictional immunity of the Sending State itself; and these aspects are usually closely interrelated and form an integral structure of the above-mentioned delicate balance of interests.

Therefore, establishing unified multilateral rules on the matter of jurisdictional immunity of foreign armed forces from civil proceedings in the Host State, to which the present draft articles might eventually contribute, can easily affect the said bilateral delicate balance of interests of the Sending State and the Host State, and thus bring about a situation in which the treatment of the armed forces in the Host State as a whole does not suit the existing nature of the bilateral relationship between the two States.

(2) From a more practical point of view, it is to be pointed out that, since the hosting of foreign armed forces is often a highly controversial matter for the Host State, there may arise random proceedings against foreign armed forces in the Host State, in case the scope the principle of State immunity is applicable in should become limited under this Convention. It is obvious that such random proceedings may affect the smooth stationing of armed forces in the Host State.

(3) Based on the views expressed above, the Government of Japan considers it appropriate that the issue of jurisdictional immunity of foreign armed forces should, as has been practised so far, be dealt with bilaterally between the Sending State and the Host State, and that armed forces of a State stationed in another State should be uniformly excluded from the scope of the present draft articles.

4. Article 3, paragraph 1 (b)

The term "them" should be replaced by the words "mission, post or delegations referred to in subparagraph (a)" because what "them" makes reference to is not clear.

5. Article 6, paragraph 1

With regard to the sentence, "A State ... shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected", the meaning of this sentence, to the understanding of the Government of Japan, is deemed to be that the State of the forum undertakes to amend or coordinate its domestic laws, etc., in order to ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected. However, the said sentence might, going beyond the meaning mentioned above, be interpreted that the State of the forum (as a matter of fact, in this case, "the State of the forum" implies the administrative authority or legislative body of that State) is obligated to undertake certain concrete measures to ensure that its courts factually render the said determination in each and every case. (It seems that if the obligation imposed on the State of the forum is only that it undertakes necessary amendments or coordination of its domestic laws, etc., this would only be ensured by the first part of paragraph 1.)

Taking into account that in a large number of States the independence of the judiciary is assumed to be constitutionally guaranteed, this paragraph might possibly be used in each case by that other State as the basis for its assertion to the administrative authority of the State of the forum to the effect that the said administrative authority must undertake certain measures against its courts in order to ensure that "the courts determine on their own initiative that the immunity of that other State under article 5 is respected".

Accordingly, in the light of the independent character of the judiciary of a State, it is deemed necessary to clarify the details of the obligation of the State of the forum under this article (for example, what sort of measures are envisaged in order to implement the said obligation?). Upon such clarification, an appropriate amendment of the wording of the article should be made, if necessary.

6. Article 8

In accordance with the articles such as paragraph 1 of article 6, under which the State of the forum shall refrain from exercising jurisdiction in a proceeding before its court against another State, it is deemed to be that the court of the said forum State would be obligated to refrain from exercising jurisdiction in such a proceeding against another State in a case where the said court determines the proceeding to be the one for which State immunity may be applicable. In other words, in such a proceeding for which the court of the State of the forum determines that State immunity may be applicable, service of process by writ or other document would not be effected against another State, and therefore the possibility of this other State's appearance as a defendant before the court would be excluded. It is also deemed to be that, even in such a case where the court of the State of the forum judges that State immunity may not be applicable to a proceeding and conducts service of process, by writ or other document against another State, so called, "Jurisdiction resulting from the general appearance" (the jurisdiction of the court of the forum State will be established when a defendant State, upon receipt of service of process by writ or other document, appears before the said court and takes measures of

attack or defence concerning the merits of the proceeding without invoking State immunity) is in principle not permitted under the present draft articles.

Therefore, the draft articles should be amended to clearly express the above-mentioned effect.

(The intention of the International Law Commission in drafting paragraph 1 (b) and paragraph 2 (b) of article 8 is not, to the understanding of the Government of Japan, to address "Jurisdiction resulting from the general appearance", but only to address the case of intervening in a proceeding between third parties.)

6.bis Article 10, paragraph 3

In this paragraph, which refers to a State enterprise or other entity possessing a legal personality that is independent of the State's legal personality, the words "legal personality" implies, to the understanding of the Government of Japan, a legal personality used not in the field of international law, but in the field of domestic (civil) law. Therefore, the wording of this paragraph should be amended to indicate clearly this meaning.

7. Article 11, paragraph 2 (a)

The scope of "functions closely related to the exercise of governmental authority" is not clear, so there is the possibility that each respective State will have a different opinion on its scope. Therefore, the wording of this paragraph should be amended so as to make the above-mentioned scope clearly defined.

Paragraph 2 (c)

The meaning of this paragraph as a whole is not clear. (For example, it is hard to envisage that "public policy" confers on a court exclusive jurisdiction.) Therefore, first of all, further consideration is needed as to the situations in which it should be appropriate not to make paragraph 1 applicable to the parties of a contract of employment who have otherwise agreed in writing.

8. Article 14

(1) An examination of the scope of intellectual property right and industrial property right is needed. (For example, as for copyright, whether or not it covers the same contents as the one stipulated in the World Intellectual Property Organization (WIPO) Agreement, etc.) And the wording of this article should be amended, if necessary, so as to make the scope of the above-mentioned rights clearly defined. It is also deemed necessary to define the scope of the rights stipulated in this article, including that of intellectual property rights, because the scope of such rights differs in each State.

(2) With regard to the words "even if provisional" in paragraph (a), the interpretation of the term "provisional" is deemed to be left to the discretion of each State party to this Convention. Therefore, the meaning of the term "provisional" should be made clear.

(3) Among the activities of diplomatic missions of each State, there seem to be certain activities (in particular, information-gathering activities), which, in many circumstances, require copying of printed matters. So in the course of examination of this article, the activities of diplomatic missions should be kept in mind.

9. Article 16

(1) This article refers only to ships owned or operated by a government. Therefore, inclusion of a separate article on aircraft in the present draft articles should be considered.

(2) The term "and" in the first line of paragraph 7 should be deleted.

10. Article 18

(1) The wording of paragraph 1 (c) should be amended so that it clearly indicates the situation in which a property "has a connection with" with the claim.

(2) The end of paragraph 1 (c) reads: "with the agency or instrumentality against which the proceeding was directed". The meaning of "agency or instrumentality" is not clear. (For example, it is not clear whether it is the same as the one referred to in article 2, paragraph 1 (b) (iv), or is a broader concept.) Therefore, after further examination of this point, the wording should be amended in such a way as to indicate clearly the meaning of the terms.

11. Article 20

(1) It is the understanding of the Government of Japan that this article refers to the ways and means of service of process by writ or other document in such cases in which jurisdictional immunity cannot be granted in accordance with articles 7 to 19, and that this article does not rest on the assumption that service of process by writ or other document can be effected against another State whether or not jurisdictional immunity can be granted to that other State.

(2) With regard to service of process by writ or other document through diplomatic channels under paragraph 1 (b) (i) and paragraph 2, it is stipulated that service of process is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs, and this should mean that service of process is deemed to be effected on the day when the Ministry has received the documents. With this in mind, the Government of Japan would like to make the following comments:

(a) Under the present draft of paragraph 2 of this article, service of process is deemed to have been effected by receipt of the Ministry of Foreign Affairs. This would mean that service of process is to be completed without any procedure undertaken by a court, etc., which is usually the case in a service of process instituting a proceeding against a private person. Accordingly, service of process under paragraph 2 is extremely simple in comparison with the one conducted under other international treaties, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which adopts the methods complying with procedures regulated by

domestic laws. With regard to service of process under the present draft articles, and according to the commentary of the International Law Commission on this article, the Commission does not seem to intend to establish an independent framework for service of process by writ or other document instituting a proceeding against a State, which is completely different from the one conducted against a private person. It is thus deemed appropriate to amend the present draft article on service of process in such a way as to comply with the framework established under already existing international conventions, for example, the above-mentioned Convention. (In this Convention, service of process is obligatory in accordance with the relevant articles. However, the actual conduct of service of process is left to the laws of each State. [ref: Article 5 (a) of the Convention]);

(b) The meaning of paragraph 2 seems to be that since the Ministry of Foreign Affairs is usually the competent authority to represent a State externally, service of process to the Ministry is recognized as service of process to the State itself. In fact, the present draft articles enumerate various types of "State" in Article 2 (b), and it may domestically cause some difficulties in each State if it were assumed that service of process by writ or other document instituting a proceeding against an organ or instrumentality which does not institutionally belong to the central government of the State, is to be completed upon receipt by the Ministry of Foreign Affairs of that State. The question of who shall actually be the recipient of service of process by writ or other document (the Ministry of Foreign Affairs, or authorities of the central government other than the Ministry, or an individual organ that is a defendant in a proceeding) seems to be resolved reasonably by leaving the actual conduct of service of process to procedures pursuant to the domestic laws of each State;

(c) From the points of views indicated in (a) and (b) above, with regard to transmission of writ or other document instituting a proceeding to the Ministry of Foreign Affairs under paragraph 1 (b) (i) of this article, authorizing a competent authority of a State (in the case of Japan, the competent authority would be a court) to conduct service of process in accordance with the domestic laws of the State once the writ or other document is transmitted to the said Ministry of that State, is deemed to be well-balanced and appropriate in comparison with the ways employed in the above-mentioned Convention, etc., and also acceptable to each State.

Accordingly, it seems to be appropriate to amend paragraph 2, for example, as follows:

> "With regard to service of process referred to in paragraph 1 (b) (i), writ or document transmitted to the Ministry of Foreign Affairs, shall be effected in accordance with the procedures for service of process of the same types of writ or documents executed under the laws and regulations of the State".

(3) With regard to the accompanying of a translation referred to in paragraph 3, since it is a recipient State that needs a translation, the paragraph should clearly indicate that effect. Therefore, following the example of Article 5 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the words "if necessary"

should be replaced by "if the State party receiving service of process by writ clearly requests that a translation is required". (This also holds true for paragraph 2 of article 21.)

12. Article 21

(1) It is the understanding of the Government of Japan that this article is not deemed to refer solely to the system of "default judgement" (which means, rendering a disadvantageous final judgement against a party for the reason that that party was absent on a day fixed for hearing or had neglected to submit the related documents to the proceeding at the fixed time) adopted in States such as Germany and the United States of America, and that, even in such a case where the State of the forum has no system of "default judgement" under its own civil proceeding laws and a court of the said State of the forum renders a final judgement while a defendant State is not present in a public trial, the said defendant State shall be treated in accordance with this article. Therefore, the title of article 21 should be amended in such a way as to reflect the above-mentioned meaning of the article.

(2) The words "and in accordance with the provisions of that paragraph" at the end of paragraph 2 are deemed redundant and are, therefore, unnecessary.